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Submitted via www.regulations.gov

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage & Hour Division, U.S. Department of Labor
200 Constitution Avenue NW, Room S-3502
Washington, DC 20210

Re: Comments on RIN 1235-AA21, Tip Regulations Under the Fair Labor Standards Act (FLSA): Partial Withdrawal

Dear Ms. DeBisschop:

The National Women's Law Center (NWLC) submits these comments in response to the United States Department of Labor's ("the Department's") Notice of Proposed Rulemaking ("NPRM"),¹ whereby the Department proposes to withdraw and re-propose portions of the 2020 *Tip Regulations Under the Fair Labor Standards Act* ("FLSA") ("2020 Tip Rule").² We support the Department's decision to withdraw the portion of the 2020 Tip Rule that eliminated the longstanding "80/20 rule," and to reinstate an updated version of the 80/20 rule that will provide more clarity for both employers and employees and better ensure that tipped workers receive all the wages they are due under the FLSA.

Since 1972, NWLC has fought for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. NWLC advocates for improvement and enforcement of our nation's employment and civil rights laws, with a particular focus on the needs of women with low incomes and their families, communities of color, and others who face historic and systemic barriers to equality and economic security. These communities are overwhelmingly represented in the tipped workforce, and NWLC consistently advocates for policies that will improve and stabilize pay in tipped jobs.

NWLC has thus consistently opposed the Department's efforts in recent years to repeal the 80/20 rule,³ which was reflected in the Department's guidance from 1988 until 2018.⁴ The 80/20 rule historically provided an important tool to curb abuse of the FLSA's tip credit provision, which permits an employer to pay as little as \$2.13 per hour to an employee engaged in a tipped occupation and count the employee's

¹ 86 Fed. Reg. 32818 (June 23, 2021).

² Tip Regulations Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86756 (Dec. 30, 2020).

³ See NWLC comments (Dec. 10, 2019), <https://www.regulations.gov/comment/WHD-2019-0004-0448>. NWLC also submitted comments in support of the Department's delay of the effective date of portions of the 2020 Tip Rule to allow the Department time to consider the questions of law, policy, and fact raised by the rule. See NWLC comments (Feb. 17, 2021), <https://www.regulations.gov/comment/WHD-2019-0004-0492>; NWLC comments (April 14, 2021), <https://www.regulations.gov/comment/WHD-2019-0004-0520>.

⁴ See U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988); see also, e.g., *Belt v. P.F. Chang's China Bistro, Inc.*, No. 18-3831, 2019 WL 3829459, at *25 (E.D. Pa. Aug. 15, 2019). As the Department is aware, between 1988 and 2018, its guidance suggested a departure from the 80/20 rule only once—in January 2009, when the Department wrote an opinion letter stating the same interpretation of the dual jobs regulation proposed in the 2020 Tip Rule. See U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Jan. 16, 2009), available at https://www.dol.gov/whd/opinion/FLSA/2009/2009_01_16_23_FLSA.pdf. This letter was never delivered, however, and the Department withdrew it one month later.

tips (i.e. take a “tip credit”) toward the remainder of the employer’s federal minimum wage obligation.⁵ Specifically, the 80/20 rule clarified that an employer cannot take a tip credit, and instead must pay the full federal minimum wage, for time beyond 20 percent of the workweek that a tipped employee spends on tasks that are related to their job but do not produce tips—a critical protection that the Department sought to abandon in 2018 guidance and in the 2020 Tip Rule, instead allowing tipped workers to be paid the subminimum tipped wage while performing an unlimited amount of such non-tipped tasks, as long as those non-tipped related duties are performed “contemporaneously with tipped duties, or for a reasonable time immediately before or after performing the tipped duties.”⁶

In the present rulemaking, the Department is correct to affirm that “particularly where the FLSA permits employers to compensate their tipped employees as little as \$2.13 an hour directly, providing protections to ensure that this reduced direct wage is only available to employers when employees are actually engaged in a tipped occupation within the meaning of section 3(t) of the statute is essential to prevent abuse.”⁷ Indeed, the separate minimum wage for tipped employees is fundamentally inequitable—rooted in racist and sexist exclusions from our nation’s labor and employment laws;⁸ the FLSA itself must be amended to ensure that tipped workers are entitled to a decent wage directly from their employers, before tips.⁹ Given that the Department’s purview is limited to enforcing the law as it exists, however, we appreciate the Department’s efforts to ensure that the rules it promulgates and administers protect tipped workers’ wages to the maximum extent possible, in keeping with its charge to improve working conditions and to “foster, promote, and develop the welfare of the wage earners. . . of the United States.” We detail our support for the Department’s revised proposal below, and make additional recommendations to further strengthen and clarify the boundaries on employers’ use of the federal tip credit.

I. The Department correctly recognizes that the 2020 Tip Rule would have produced confusion for employers and employees alike, while reducing earnings for tipped workers.

Even before the COVID-19 pandemic, median hourly earnings for people working in common tipped jobs like restaurant server and bartender were \$12 or less, including tips,¹⁰ and poverty rates for tipped workers were more than twice as high as rates for working people overall.¹¹ Women—disproportionately women of color—represent more than two-thirds of tipped workers nationwide, and are even more likely to experience poverty than their male counterparts.¹² The Department should be working to protect and

⁵ The FLSA at section 3(m) only allows employers to take a tip credit for a “tipped employee,” defined at section 3(t) as an “employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” This definition requires further explanation to ensure that employers understand when an individual employee is employed in both a tipped occupation (for which the employer may take the tip credit) and a non-tipped occupation (for which the employer must pay at least the full minimum wage). The “dual jobs” regulation at 29 C.F.R. § 531.56(e) thus distinguishes between an employee who holds both a non-tipped and a tipped occupation and a person in a tipped occupation who performs some related, non-tipped tasks.

⁶ See 85 Fed. Reg. 86757.

⁷ 86 Fed. Reg. 32827.

⁸ See, e.g., Michelle Alexander, *Tipping Is a Legacy of Slavery*, N.Y. Times (Feb. 5, 2021), <https://www.nytimes.com/2021/02/05/opinion/minimum-wage-racism.html>; Testimony of Rebecca Dixon, National Employment Law Project, before the U.S. House of Representatives Workforce Protections Subcommittee, *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act* (May 3, 2021), <https://edlabor.house.gov/imo/media/doc/DixonRebeccaTestimony050321.pdf>.

⁹ See, e.g., *The Raise the Wage Act: Valuing Working People and Advancing Equal Pay*, NWLC (March 2021), <https://nwlc.org/wp-content/uploads/2019/10/RTWA-FS-2021-v3.pdf>.

¹⁰ According to the most recent national wage estimates, which are based on data collected between November 2017 and May 2020 (near the onset of the pandemic), median hourly wages, including tips, were \$11.42 for waiters and waitresses and \$12.00 for bartenders, the two largest groups of tipped workers. See U.S. Dep’t of Labor, Bureau of Labor Statistics, May 2020 National Occupational Employment and Wage Estimates, https://www.bls.gov/oes/current/oes_nat.htm (last accessed Aug. 16, 2021). Tipped workers in other occupations have similarly low wages, such as barbers/hairstylists/cosmetologists (\$13.28) and baggage porters and bellhops (\$13.00). *Id.*

¹¹ See *One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers*, NWLC (Feb. 2021), <https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v3.pdf>.

¹² *Id.*

increase pay for tipped workers, especially in the context of a pandemic that has been particularly devastating for women of color working in leisure and hospitality jobs.¹³

The 2020 Tip Rule's amendments to the dual jobs regulation, however, would have done just the opposite because, as the Department observes in the current rulemaking, "[i]f employers require tipped workers to perform more non-tipped work outside their tipped occupation, these low-wage workers' earnings could be reduced even further."¹⁴ As numerous courts have already recognized in refusing deference to the identical policy adopted in earlier guidance,¹⁵ the 2020 Tip Rule's replacement of the 80/20 rule's longstanding 20 percent limit on related, non-tipped work with vague "reasonable time" language removed any meaningful temporal restriction on the non-tipped duties for which an employer may claim a tip credit.¹⁶ The predictable result (even acknowledged by the Department in its 2019 NPRM) is that tipped employees could "lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage"¹⁷—and if an employer could pay a tipped employee less to spend more time on "related" tasks like cleaning and food prep that have traditionally been performed by back-of-house staff, that could drive down wages for, or even eliminate, back-of-house positions in restaurants.¹⁸

In the restaurant industry and beyond, weakening the regulatory barriers to abuse of the tip credit—and tipped employees—would thus incentivize employers to require working people to do more work for less pay. In 2019, the Economic Policy Institute (EPI) estimated that tipped workers would lose more than \$700 million dollars in pay each year if the Department's proposal took effect,¹⁹ which aligns with the Department's estimate in the current rulemaking that up to \$714 million could be transferred from workers to employers under the 2020 Tip Rule.²⁰ While the Department suggests that \$714 million is more likely an overestimate than an underestimate, we believe the opposite is probable because of the degree to which non-tipped work has grown during the pandemic in industries that employ large numbers of tipped workers; the shift in many restaurants from dine-in to carry-out service, for example, could encourage employers to pay just \$2.13/hour for greater amounts of non-tipped work, unless appropriate restrictions are in place to prevent this practice. In addition, tips are known to be significantly underestimated in the Current Population Survey from the Bureau of Labor Statistics, which both EPI and the Department of Labor rely on in their estimates, making an underestimate of the amount of tips that employers would capture more likely.²¹

NWLC therefore strongly supports the Department's decision to restore and strengthen the 80/20 rule, which we agree is "an essential backstop to prevent abuse of the tip credit,"²² and to codify it in regulation. By reversing the Trump-era measures to weaken worker protections, the Department is likely

¹³ See, e.g., Jasmine Tucker & Julie Vogtman, *Women in Leisure and Hospitality Need Good Jobs to Return To*, NWLC (June 2021), <https://nwlc.org/wp-content/uploads/2021/06/LH-Sector-Factsheet-v3.pdf>.

¹⁴ 86 Fed. Reg. 32826.

¹⁵ U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA 2018-27, 2018 WL 5921455 (Nov. 8, 2018); Field Operations Handbook § 30d00(f)(1)-(5) (Feb. 15, 2019); Field Assistance Bulletin No. 2019-2 (Feb. 15, 2019).

¹⁶ See, e.g., *Flores v. HMS Host Corp.*, No. 8:18-CV-03312-PX, 2019 WL 5454647, at *12-13 (D. Md. Oct. 23, 2019); *Belt*, 2019 WL 3829459 at *25; *Spencer v. Macado's, Inc.*, 399 F. Supp. 3d 545, 553 (W.D. Va. 2019); *Esry v. P.F. Chang's China Bistro, Inc.*, 373 F. Supp. 3d 1205, 1210 (E.D. Ark. 2019) (noting abolishing the 80/20 rule is an "about face" for the Department); *Cope v. Let's Eat Out, Inc.*, 354 F. Supp. 3d 976, 986 (W.D. Mo. 2019) ("Aside from expressing the DOL's desire to clarify the FOH sections addressing the tip credit, the DOL does not offer reasoning or evidence of any thorough consideration for reversing course."); *Callaway v. DenOne LLC*, No. 18 Civ. 1981, 2019 WL 1090346, at *7 (N.D. Ohio Mar. 8, 2019).

¹⁷ 2019 Tip Rule, 84 Fed. Reg. at 53972.

¹⁸ The Department acknowledges this possibility as well; see 2019 Tip Rule, 84 Fed. Reg. at 53972. See also NWLC comments (Dec. 10, 2019), *supra* note 3, at 6 (describing increased use of tip credit in positions for which employees previously received at least the full minimum wage following the Department's Trump-era guidance).

¹⁹ Heidi Shierholz & David Cooper, *Workers Will Lose More Than \$700 Million Annually Under Proposed DOL Rule*, WORKING ECON. BLOG (Nov. 30, 2019), <https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/>.

²⁰ See 86 Fed. Reg. 32838.

²¹ See Shierholz & Cooper, *supra* note 19.

²² 86 Fed. Reg. 32827.

protecting at least \$700 million in tipped workers' earnings, and potentially considerably more. The Department's efforts to strengthen and clarify the 80/20 rule, discussed in the section that follows, will protect tipped workers' earnings still further.

II. The Department's revised rule improves clarity around allowable use of the tip credit but could be strengthened further to protect tipped workers' earnings.

We appreciate the changes the Department has proposed to strengthen the 80/20 rule in the process of codifying it within the dual jobs regulation—namely, to provide more specific examples of the categories of tasks relevant to the regulation, and to provide an additional temporal limit on non-tipped duties for which employers may claim a tip credit. We encourage the Department to consider additional changes to strengthen the final rule.

- A. *The proposed rule appropriately discards the 2020 Tip Rule's references to O*NET, and the illustrative examples that the Department proposes to add to the dual jobs regulation provide clarity that the 2020 Tip Rule lacked.*

NWLC supports the Department's conclusion that it was inappropriate to establish a presumption that a non-tipped duty is related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O*NET, and support the Department's decision to reject this element of the 2020 Tip Rule. As the Department notes in the present rulemaking, O*NET "is a tool for career exploration" that "was not created to identify employer's legal obligations under the FLSA," and because O*NET uses data obtained in part by asking employees which duties their employer are requiring them to perform, O*NET may reflect duties of a non-tipped occupation on the task list of tipped occupation simply because employers are requiring tipped workers to do non-tipped work.²³ For example, O*NET currently lists cleaning bathrooms among the tasks for waiters and waitresses,²⁴ a task that DOL guidance had long held is not related to the tipped occupation of a server.²⁵

We agree that, in lieu of reliance on O*NET, it is helpful for the Department to provide specific examples of tip-producing work, work that directly supports tip-producing work, and work that is not part of the tipped occupation. In our prior comments we suggested that more tightly defining duties related and unrelated to tipped occupations would strengthen the 80/20 rule, and we approve of both the specific examples the Department has provided in its proposal as well as the categories of work that it has devised, which provide a considerably clearer rubric for evaluation than the concept of "related duties." We encourage the Department, however, to specify in the definition of "tip-producing work" that such work is customer-facing. And while we find the examples included in the proposed regulation to be helpful and appropriately categorized, we suggest that the Department consider adding still more examples to improve clarity for both employers and employees.

- B. *The proposed rule appropriately recognizes that a tipped employee may be engaged in a non-tipped occupation when they perform a substantial amount of non-tipped work during a single shift, even if non-tipped work does not meet the 20 percent threshold during a workweek.*

The 80/20 rule itself illustrates the value of bright-line rules to simplify compliance with the tip credit provisions of the FLSA, but it does not capture all scenarios in which a tipped worker is required to perform non-tipped duties to such an extent that their work shifts to a non-tipped occupation for which the FLSA requires that their employer pay the full minimum wage. Under the historic 80/20 rule, for example,

²³ 86 Fed. Reg. 32825.

²⁴ See O*NET Online, Summary Report for: 35-3031.00 – Waiters and Waitresses, Tasks, <https://www.onetonline.org/link/summary/35-3031.00#Tasks>.

²⁵ U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988) (specified as an example that "maintenance work (e.g., *cleaning bathrooms* and washing windows) [is] not related to the tipped occupation of a server) (emphasis added).

a restaurant server could spend three hours of a six-hour shift cleaning tables, rolling silverware, and performing other such side work for just \$2.13 an hour, so long as their remaining shifts in the week included enough tipped duties to fall below the 20 percent threshold for non-tipped, related tasks.

The Department's proposed definition of "substantial amount of time" appropriately closes this loophole, recognizing that when an employer assigns an employee to perform non-tipped duties continuously for more than 30 minutes—even when such duties support tip-producing work—the employee is "no longer performing incidental work but instead has ceased to be engaged in their tipped occupation for that entire period," and the employer therefore cannot take a tip credit for that block of time.²⁶ We agree that 30 minutes is a reasonable threshold for this determination, but we urge the Department not to consider allowing employers to take a tip credit for a longer period of continuous non-tipped work; in fact, adopting a threshold that is less than half an hour (e.g., 20 minutes) could better safeguard tipped workers against abusive pay practices.

C. Additional limitations on employer use of the tip credit for non-tipped duties could further protect earnings for tipped workers.

We encourage the Department to evaluate whether it may, consistent with the FLSA, further clarify—and limit—the amount of non-tipped work for which an employer can pay employees anything less than the full minimum wage. The Department should consider, for example, directing employers to assess the relative share of tipped and (related and unrelated) non-tipped duties on a per-shift, rather than per-workweek, basis; barring an employer from taking any tip credit for an employee on any day during which the employee spends more than 20 percent of their time in a non-tipped occupation (as is the policy in New York²⁷), even if individual blocks of non-tipped work do not exceed 30 minutes; clarifying that an employer may not claim a tip credit for time when the employer's establishment is not open for service to customers (as is the policy in Connecticut²⁸); and/or strengthening notice and recordkeeping requirements,²⁹ including by requiring employers to provide employees with clear information regarding hours deemed to be spent in tipped and non-tipped occupations and wage rates applied. Indeed, "since employers, in order to manage employees, must assign them duties and assess completion of those duties, it is not a real burden on an employer to require that they be aware of how employees are spending their time before reducing their wages by 71%."³⁰

These policy changes could better effectuate the overarching goal of the 2018 FLSA amendments that this rulemaking is implementing—that is, to improve economic security for tipped workers. If the tracking of duties and recordkeeping required to prevent abuse of the tip credit and ensure that employees receive the pay to which they are entitled under the FLSA is considered onerous, employers can choose to pay tipped workers the full minimum wage for all hours worked. And Congress holds the power to enact the legislative fix that will simplify compliance for employers and more substantially boost incomes for tipped workers: a single, fair minimum wage that applies to all working people, tipped and non-tipped alike.³¹

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²⁶ 86 Fed. Reg. 32830.

²⁷ See N.Y. Comp. Codes R. & Regs. Tit. 12 § 146-2.9.

²⁸ See Regulation of the Conn. Dep't of Labor Concerning Tip Credit, § 31-62-E2a (Sept. 24, 2020), <https://eregulations.ct.gov/eRegsPortal/Search/getDocument?guid={6037C174-0000-CC14-B3D3-93941FD076BE}>.

²⁹ See, e.g., New York's requirements at N.Y. Comp Codes R. & Regs. Tit. 12 §§ 146-2.1 - 2.3, 146-2.14 - 2.20.

³⁰ *Irvine*, 106 F. Supp. 3d at 734.

³¹ See generally, e.g., *One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers*, *supra* note 11; *The Raise the Wage Act: Valuing Working People and Advancing Equal Pay*, *supra* note 9; *Tipped Over: Employer Liability in a Two-Tiered Wage State*, ROC UNITED (June 2016), <https://chapters.rocunited.org/publications/tipped-over/>.

Thank you for your consideration, and please do not hesitate to contact Julie Vogtman at jvogtman@nwlc.org if you have questions or require additional information regarding these comments.

Sincerely,



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